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IN THE COURT OF APPEALS OF INDIANA

PHILIP LITTLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0510-CR-509
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0412-FA-119

December 15, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Philip Littler ("Philip") appeals his conviction for murder,[1] a felony. We affirm.

Issues

Littler presents three issues for our review, which we restate as follows:

I. Whether the trial court was within its discretion in excluding testimony of the victim's mother that the victim, Neal Littler ("Neal"), was mentally ill, had been violent to Philip, and had injured other persons and animals;

II. Whether the trial court properly permitted the State to add a murder charge after the omnibus date; and

III. Whether the State presented sufficient evidence to support the murder conviction in light of Philip's self-defense claim.

Facts and Procedural History

On the night of December 14, 2004, eighteen-year-old Neal went to the Lakeville home of his grandmother, June McCrum ("McCrum"), to visit his twin brother, Philip. Tr. at 600.[2] At the time, Philip and his cousin, Aaron Young ("Young"), were living with McCrum. *Id*. at 355. Late that evening, Philip and Neal argued and wrestled. *Id*. at 361, 615-18. McCrum awoke and broke up the altercation. *Id.* at 364. Yet, the fighting continued and escalated, with Neal removing a knife from a kitchen drawer, threatening Philip, and then putting it away. *Id*. at 365. Shortly thereafter, Neal took out a knife again.

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[1] Ind. Code § 35-42-1-1.

[2] As the parties acknowledge, the materials provided are arranged in an unusual manner. Included are three volumes of the proceedings held at trial August 15-17, 2005. An additional volume, with separate pagination, contains the proceedings held April 6, April 15, July 21, August 10, August 18 (last day of trial, pages 94-181), and September 20, 2005 (sentencing, pages 182-94). Further, in addition to a standard exhibits volume, there is a two-volume transcript of numerous phone conversations taped from the jail. When we use "Tr.," we are referring to the three-volume trial transcript. We shall use slightly different, more explanatory, citations when referencing the other volumes.

Id. at 365-68. Philip moved to the kitchen, Neal followed with knife in hand, and words were exchanged. *Id*. Philip pulled out a handgun and shot Neal in the head, killing him. *Id*. at 368, 528, 628-31. With a backpack, Philip left the home. *Id*. at 640-41, 272-73. Police quickly apprehended Philip, found a handgun in his possession, and transported him to jail, where he received treatment for a broken hand. *Id*. at 274, 548-49.

On December 16, 2004, the State charged Philip with voluntary manslaughter[3] and possession of a handgun with identification obliterated.[4] Appellant's App. at 5. Thereafter, Philip filed a notice of his intention to assert self-defense and his intention to introduce evidence of prior bad acts by the victim, Neal. *Id*. at 15-18. On July 21, 2005, the State filed an amended information charging Philip with four counts: murder, voluntary manslaughter, possession of a handgun with identification obliterated, and escape. *Id*. at 10-11. At a hearing held on that day, the court allowed the amendment, but severed the escape count. *Id*. at 3, 21-23. On August 8, 2005, Philip filed a motion to dismiss the amended charge of murder. *Id*. at 26-31.

On August 15, 2005, the court denied Philip's motion, and the jury trial commenced. *Id*. at 4-5. At the close of the State's case, Philip moved for a "directed verdict of acquittal on the murder and voluntary manslaughter charges for sufficiency of the evidence," which the court denied. Tr. at 556-57. Later, the court withdrew the voluntary manslaughter count from the jury's consideration, and therefore did not read an instruction on that charge. Aug.

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[3] Ind. Code § 35-42-1-3.

[4] Ind. Code § 35-47-2-18(a).

18 Tr. at 124. On August 18, 2005, the jury found Philip guilty of both murder and the handgun charge. *Id*. at 176. Approximately one month later, the court ordered a sentence of fifty years on the murder count and four years on the handgun count, to be served concurrently. Sept. 20 Tr. at 189; Appellant's App. at 4. Five years of the former were suspended to probation. In October 2005, Philip pled guilty to the escape count and received a one-year prison term to be served concurrently with his other sentences. Appellant's App. at 4.

Discussion and Decision

I. Exclusion of Testimony

Philip first asserts that it was reversible error for the trial court to exclude the testimony of his and Neal's mother, Jamie Lawson. He contends that Lawson would have testified that Neal had a reputation and character as a violent and dangerous person. In addition, Philip maintains that she would have corroborated various specific acts committed by Neal.

"The decision whether to admit evidence will not be reversed absent a showing of manifest abuse of a trial court's discretion resulting in the denial of a fair trial." *Allen v. State*, 813 N.E.2d 349, 361 (Ind. Ct. App. 2004), *trans. denied.* Therefore, even if the trial court abused its discretion, we disregard as harmless such errors in the admission or exclusion of evidence unless they affect the substantial rights of a party. *Coleman v. State*, 694 N.E.2d 269, 277 (Ind. 1998). In determining whether an evidentiary ruling affected a party's substantial rights, the court assesses the probable impact of the evidence on the trier of fact. *Id*.

In analyzing Philip's evidentiary challenge, we find it helpful to review the law of self-defense.[5] A valid claim of self-defense is a legal justification for an act that is otherwise defined as "criminal." Ind. Code § 35-41-3-2(a); *see also Pinkston v. State*, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004), *trans. denied*. To prevail on such a claim, the defendant must show that he: (1) was in a place where the defendant had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. *Pinkston*, 821 N.E.2d at 842. An individual is justified in using deadly force only if he "reasonably believes that that force is necessary to prevent serious bodily injury to [the individual] or a third person." Ind. Code § 35-41-3-2(a). The amount of force that an individual may use to protect himself must be proportionate to the urgency of the situation. *Hollowell v. State*, 707 N.E.2d 1014, 1021 (Ind. Ct. App. 1999). When a person uses more force than is reasonably necessary under the circumstances, the right of self-defense is extinguished. *Id*. Further, "a person is not justified in using force if 1) he provokes unlawful action by another person with intent to cause bodily injury to the other person, or 2) has entered into combat with another person or is the initial aggressor, unless he withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action." *Gillespie v. State*, 832 N.E.2d 1112, 1117 (Ind. Ct. App. 2005).

"When a defendant asserts a claim of self-defense, as [Philip did], any evidence legitimately tending to support his theory is admissible." *Harmon v. State*, 849 N.E.2d 726,

731 (Ind. Ct. App. 2006). Such evidence must imply a propensity for violence on the part of the victim. *See Brand v. State*, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002), *trans. denied*. "While the victim's threats or violence need not be directed toward the defendant, the latter must have knowledge of these matters at the time of the confrontation between the victim and the defendant." *Harmon*, 849 N.E.2d at 731. Although the defendant's belief of apparent danger does not require that it be actual danger, the belief must be in good faith. *See id.* "The question of the existence of such danger, the necessity or apparent necessity, and the amount of force necessary to employ to resist the attack can only be determined from the standpoint of the defendant at the time and under all the then existing circumstances." *Id*. Focusing on the "standpoint of the defendant": (1) demands that the trier of fact consider the circumstances only as they appeared to the defendant, and (2) makes the defendant's own account of the event, although not required to be believed, critically relevant testimony. *See id*.

Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]" Ind. Evidence Rule 404(a); *Brooks v. State*, 683 N.E.2d 574, 576 (Ind. 1997). Yet, the rule *does* permit the admission of "[e]vidence of a *pertinent trait of character of the victim* of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]" Evid. R. 404(a)(2) (emphasis added). "Thus,

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[5] We shall refer to the law regarding self-defense again when we address Philip's sufficiency challenge *infra*.

Evidence Rule 404(a)(2) provides an exception to the rule against introducing evidence to imply that a person acted in conformity with character on a particular occasion." *Brand*, 766 N.E.2d at 779. "However, Evidence Rule 404(a)(2) does not contemplate that character evidence will offer a glimpse into a defendant's mind at the time he acted in self-defense." *Id*. In *Brand*, we further explained:

> Introduction of specific acts to prove the defendant's state of mind would support the proposition that the defendant had a reasonable belief that deadly force was necessary. In contrast, introduction of specific acts as victim character evidence, as permitted by Rule 404(a)(2), would support the proposition that the victim was using unlawful force. These are two separate and distinct propositions, and in fact constitute separate elements of self-defense. Moreover, because the general exclusionary rule of Evidence Rule 404(a) applies only when character evidence is used for the purpose of proving action in conformity with his character, it is apparent that when character evidence is utilized for some other purpose, such as to show defendant's state of mind, the rule is inapplicable.

Id.

During trial, Philip claimed self-defense. Specifically, Philip testified that Neal pulled a knife on him and threatened to kill him on the night in question. Philip also testified that when he was cornered in the kitchen, he believed Neal would stab and kill him. Philip was permitted to testify to various acts committed by his brother that made him afraid of Neal's violent character. For instance, Philip testified that Neal tortured and killed family pets as a child, stabbed Philip twice, attempted to stab Philip two other times, stabbed their stepfather, and stabbed a fellow patient in a mental hospital. Tr. at 634-49, 655-56. In addition, Philip testified that Neal had been diagnosed with bi-polar disorder, had been hospitalized in six different psychiatric hospitals, and suffered mood swings, including manic episodes. *Id*. at 648-53. Philip further testified that around the time of the crime, Neal was exhibiting manic

characteristics. *Id*. at 650-53, 658. Philip also stated that Neal had ceased taking his medication, discontinued receiving mental health treatment, failed to report to his parole officer despite a warrant for his arrest, and told Philip that he would not be taken alive. *Id*. at 652, 657.

Philip contends that Lawson should have been permitted to testify to the following:

> 1. [Neal] was seriously mentally ill suffering from bi-polar disease;
> 2. Neal had threatened Philip with a knife on many occasions and had stabbed him on, at least, two occasions including once when Philip was hospitalized;
> 3. Neal tortured and killed small animals and family pets for enjoyment;
> 4. Neal stabbed his step-father multiple times causing him serious injury;
> 5. Neal stabbed other persons including another person in a mental hospital;
> 6. That Neal had attempted suicide;
> 7. That Neal had discontinued his mental health counseling and stopped taking his medication; and
> 8. That Neal stopped seeing his probation officer, knew there was a warrant for him and had determined that he would not be taken alive.

Appellant's Br. at 12.

It appears that Lawson's excluded testimony would have largely mirrored Philip's testimony. As such, Philip's mother's testimony could have provided additional support for the reasonableness of Philip's fear of Neal. Indeed, Lawson's corroborative testimony could have assisted Philip's claim of self-defense "considering his credibility was of utmost importance to his defense." *Brand*, 766 N.E.2d at 782 (citing *Nuss v. State*, 164 Ind. App. 396, 328 N.E.2d 747, 754 (1975)). Therefore, we find error in the trial court's exclusion of Lawson's testimony regarding the violent nature of and specific instances of bad conduct committed by her son, Neal.

Our inquiry does not end here, however. "We will find an error in the exclusion of evidence harmless if its probable impact on the jury, in light of all of the evidence in the case,

is sufficiently minor so as not to affect the defendant's substantial rights." *Brand*, 766 N.E.2d at 782. As should be clear, Lawson's testimony would have been cumulative of Philip's lengthy testimony. *Cf. id.* at 783 n.10 (reversing conviction where excluded testimony was not cumulative of any evidence presented at trial). Moreover, unlike the defendant in *Brand*, Philip was permitted to "fully testify as to his actual belief that he was in imminent harm." *Id*. at 783. Accordingly, we conclude that the excluded testimony does not require us to reverse Philip's conviction and order a new trial. *See id*. at 783 n.10 (noting that the excluded evidence "viewed individually" would not have required reversal).

II. Denial of Motion to Dismiss/Amendment of Information

Philip next challenges the State's amendment of the information. We provide the relevant procedural details. The State originally charged Philip on December 16, 2004 with voluntary manslaughter and the handgun offense. On July 21, 2005, long after the March 23, 2005 omnibus date, and less than a month before trial, the State moved to amend the charges to add murder and escape. At a hearing that day on the matter, Philip claimed prejudice, and the State was asked the reason for the late filing. The State responded that the amendment was based upon recent review of recorded telephone conversations at the jail between Philip and his grandmother and cousin, rather than upon prosecutorial vindictiveness. Philip did not request a continuance, and the court permitted the amendment of charges.

On August 8, 2005, Philip filed a motion to dismiss the murder charge, arguing that the amendment was untimely and violated Indiana Code Section 35-34-1-5, that the State had never designated the precise new evidence that had prompted the amendment, and that the taped phone conversations contained derogatory/inflammatory comments that could have

incited the prosecutor to file the additional charges. At a pre-trial hearing two days later, the State explained its amendment this way: "After listening to the tapes and reviewing the physical evidence with regard to Dr. Prahlow [who performed the autopsy], we believe that there is evidence to support the charge of murder." Aug. 10 Tr. at 89. The court took the matter under advisement. On the day of trial, the court denied Philip's motion to dismiss, admitted that it had not reviewed the tapes, and explained that it had trusted the prosecutor that the tapes contained material relevant to Philip's state of mind. Although Philip objected, the trial proceeded as scheduled on the amended charges.

In reviewing a motion to dismiss, we apply the same standard as the trial court; that is, assuming the facts alleged in the information to be true, the charge will be dismissed if the facts do not constitute the offense charged. *See State v. Heltzel*, 552 N.E.2d 31, 33 (Ind. 1990). Indiana Code Section 35-34-1-5, which governs the amendment of an information, provides as follows:

> (b) The indictment or information may be amended in matters of substance or form … by the prosecuting attorney,
> upon giving written notice to the defendant, at any time up to:
> (1) thirty (30) days if the defendant is charged with a felony....before the omnibus date....
> (c) *Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.*
> (d) Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

(Emphasis added). While the above section authorizes amendment of both form and substance, as a general rule, an information may not be amended to change the theory of the case or the identity of the charged offense. *See Prewitt v. State*, 761 N.E.2d 862, 868 (Ind. Ct. App. 2002); *Sides v. State*, 693 N.E.2d 1310, 1313 (Ind. 1998). "However, an amendment that does not prejudice the defendant's substantial rights, including the right to notice and an opportunity to be heard, is permissible." *Prewitt*, 761 N.E.2d at 868. The "opportunity to be heard" requirement is met when the defendant is given adequate time to object and request a hearing after proper notice. *Parks v. State*, 752 N.E.2d 63, 65 (Ind. Ct. App. 2001). "To preserve this issue for appeal, the defendant must object to the request to amend, and if the objection is overruled, *must request a continuance to prepare a new defense strategy*." *Id*. (emphasis added).

After the court overruled Philip's objections to the amendment, Philip did not request a continuance to prepare a new defense strategy. Had Philip "seriously believed that the amendment of the charges prejudiced him in any way, he should have requested a continuance to further evaluate and prepare his case in light of the amendments." *Wright v. State*, 690 N.E.2d 1098, 1104 (Ind. 1997). "Having failed to request a continuance after the court granted the motion to amend, [Philip] has waived this issue on appeal." *Id*. (citing *Haymaker v. State*, 667 N.E.2d 1113, 1114 (Ind. 1996)). We are not at liberty to disregard our state supreme court's precedent.

Waiver notwithstanding, Philip has not demonstrated how his substantial rights were affected by the court's allowance of the amended information and denial of the motion to dismiss the murder charge. The original information charged that Philip "did knowingly kill

Neal Littler, while acting under sudden heat, while armed with a deadly weapon, to-wit: a Firestar .40 caliber handgun, by shooting Neal Littler with the handgun, causing him to die." Appellant's App. at 5 (citing Ind. Code § 35-42-1-3, voluntary manslaughter, class A felony). The amended information charged that Philip "did knowingly kill another human being, to-wit: Neal Littler by shooting him with a .40 Caliber handgun, causing him to die." *Id*. at 21 (citing Ind. Code § 35-42-1-1(1), murder). Not surprisingly, the only substantive difference in the charging instruments was the reference to sudden heat.

Sudden heat is not an actual element of voluntary manslaughter, but a mitigating factor in conduct that would otherwise be murder. *See Palmer v. State*, 425 N.E.2d 640, 644 (Ind. 1981). "The elements of murder and voluntary manslaughter are identical: knowing and intentional killing of another human being. There is no implied element of the absence of sudden heat in the crime of murder." *Id*. Rather, the voluntary manslaughter statute

> creates an affirmative defense of sudden heat akin to self-defense. The latter is, if successful, a complete defense while the defense of sudden heat is only a partial defense because it reduces the seriousness of the crime . . . . It is akin to self-defense in that its introduction into the case (either through the State's own evidence or through the defendant's evidence or both) places a burden upon the State to negate the defense beyond a reasonable doubt and calls for an instruction on the lesser included offense of voluntary manslaughter.

Id. A claim of self-defense is not necessarily inconsistent with finding killing in a sudden heat. *See Clark v. State*, 834 N.E.2d 153, 157 (Ind. Ct. App. 2005).

From the beginning, when he was charged with voluntary manslaughter, Philip claimed self-defense. His theory did not change with the addition of the murder charge. Indeed, his theory remained the same by the end of trial, when *defense counsel* specifically stated that Philip did "not wish the Court to instruct on voluntary manslaughter." Aug. 18 Tr.

at 97-98. Had Philip's self-defense claim been successful, it would have operated as a complete bar to conviction for murder. Likewise, a successful self-defense claim would have barred conviction for voluntary manslaughter had that charge been submitted to the jury. Given the similarity of the charges and the fact that his defense did not change, Philip has not shown prejudice to his substantial rights.

Nonetheless, Philip's related prosecutorial vindictiveness argument merits some discussion. Citing *Warner v. State*, 773 N.E.2d 239, 244 (Ind. 2002), Philip asserts that the State should not have been allowed to bring the murder charge, a more serious charge, in the absence of relevant new evidence where the potential for prosecutorial vindictiveness is too great. Appellant's Br. at 17. He faults the State for not providing exact page citations to the transcript of phone conversations support its amendment and criticizes the trial court for "blindly accepting" the State's asserted non-vindictive reason(s)[6] for filing the murder charge. *Id.* at 17-18.

Indisputably, during jailhouse phone conversations with his family, Philip made unflattering comments about the prosecutor and the police.[7] That said, we are hard-pressed to believe that a voluntary manslaughter suspect's non-public expression of his private opinion regarding those prosecuting him would actually motivate a prosecutor to file

[6] Originally, the State noted the phone conversations as its reason for amending. Later, the State expanded its reason to the phone conversations and the autopsy.

[7] The prosecutor was referred to as ambitious, an immature b----, and as having her head in her a--. Tapes Tr. at 52, 181, 165. The police were referred to as ignorant, d---heads, ignorant f---s, and f------ pigs. *Id*. at 31, 303, 330, 348.

completely baseless, unsupportable charges.[8] Nevertheless, assuming for the sake of argument that a defendant's uncomplimentary words could incite a prosecutor in this manner, we address whether the State lacked justification for its amendment of charges. Specifically, we examine whether the phone conversations contained new information that would support an allegation of knowingly killing (murder), rather than a charge of knowingly killing, while acting under sudden heat (voluntary manslaughter). In our analysis, we keep in mind that sudden heat is characterized as "'anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary person, preventing deliberation and premeditation, excluding malice, and rendering a person incapable of cool reflection.'" *Clark*, 834 N.E.2d at 158 (citing *Dearman v. State*, 743 N.E.2d 757, 760 (Ind. 2001)). "To establish that a defendant acted in sudden heat, the defendant must show 'sufficient provocation to engender ... passion.'" *Id*. (citing *Johnson v. State*, 518 N.E.2d 1073, 1077 (Ind. 1988)).

Our review of the 436 pages of phone conversations convinces us that legitimate new information prompted the addition of the murder charge. The State's failure, at both the trial and appellate level, to provide specific citations to the portions of the transcript that support its amendment was initially frustrating. However, upon sifting through the two volumes of taped conversations, we have come to the conclusion that it is difficult to pinpoint one or two statements that demonstrate conclusively that sudden heat was not involved, thereby making murder rather than voluntary manslaughter the proper charge. Indeed, several of the

[8] Indeed, it is difficult to fathom that such name-calling is unusual or that a person who chooses a position in law enforcement would have skin so thin that such offhand remarks would overshadow serious decision-making.

conversations are simply discussions of everyday life events. However, many of the conversations do focus upon the killing, and it is the tenor of those discussions, coupled with the results of the autopsy, that make a compelling case for a charge of murder. We include a representative excerpt:

> Philip: Where did I shoot him?
> Young[9]: It went through his mouth.
> Philip: Bulls---.
> Young: Yeah.
> Philip: The autopsy says nose. It says it exited his C1 cervical, the first cervical. The back where your spinal cord meets your – you know.
> Young: What if there is no sign of it though?
> Philip: That's what I said. I said I didn't see that s---.
> Young: Well, grandpa has from the funeral and they (inaudible). They also said he had a big gash on his head.
> Philip: He did when I hit him.
> Young: Well, I never seen it.
> Philip. And he had a scar on his eye from the second time I hit him.
> Young: I never seen that.
> Philip: You didn't see that s---?
> Young: Nope.
> Philip: I was playing with that s---, remember?
> Young: I don't know.
> Philip: Do you remember when I said when we were looking for the bullet hole?
> Young: Oh, yeah.
> Philip: I touched him, is that it?
> Young: Yeah. All right.
> Philip: Yeah. That's from us fighting. That's another thing. That's subordinate. They ain't going to bring that up.
> Young: Yeah.
> Philip: I want to know is how the knife got from A to B.
> Young: I don't know.
> Philip: Did you see the s--- fly?
> Young: I seen it come out of his hand.
> Philip: But you didn't see it fly that way?
> Young: No.

[9] As a reminder, Young is Philip's cousin who was present on the night that Philip shot Neal. The actual transcript denotes the parties engaged in the conversation as "Mr. Littler" and "Mr. Young."

> Philip: I don't think it could have went no ten f------ feet.
> Young: But nobody touched it, dude. That's what I'm saying.
> Philip: I don't know, man. When the cops got there, where did you go?
> Young: Huh?
> Philip: Where did you go when the cops got there?
> Young: After you left I still holding Neal for a little bit.
> Philip: You did what I told you too?
> Young: Yeah. And then I seen the lights and I ran downstairs and got them.

Phone Tr. 184-86.

Dr. Joseph Prahlow, the forensic pathologist who performed the autopsy, testified that the bullet entered through Neal's nose, left gunshot stipple marks on his face, and was fired from a distance of approximately "one to three" feet. Tr. at 512. He further testified that the bullet "hit the left side of the cervical vertebral body . . . . The part the head sits on," and went so close to the spinal cord that it caused Neal to immediately collapse before it caused his death. *Id*. at 505-06, 528. In addition, the autopsy revealed various blunt force injuries, including:

> multiple abrasions and contusions of his face and scalp. He had abrasions and contusions at the back of both of his ears, especially on the left side. He had an abrasion on his neck in the back. He had some abrasions and contusions on his chest. He had some abrasions on his upper extremities, his arms. He had some contusions and superficial abrasions on his back. He had abrasions of his knee areas. There are also some injuries on his shins below his knees.

Id. at 513. Although not the cause of death, one particular injury to Neal's left forehead "could have been caused by being struck by" the gun. *Id.* at 525. Again, while the autopsy evidence alone did not prompt the State to file murder charges, the subsequent phone

conversations combined with the autopsy evidence provide sufficient justification for the amendment.[10]

III. Sufficiency of Evidence

In challenging his murder conviction, Philip reiterates his self-defense theory. In particular, he focuses upon his and his cousin's testimony, which he claims showed that he was in a place where he had a right to be, that he acted without fault, and that he had a reasonable fear of death or great bodily harm. Philip asserts that the State relied upon insufficient, circumstantial evidence, such as Dr. Prahlow's testimony, to prove its theory that Philip and Young beat and murdered Neal.

We review a sufficiency challenge involving a self-defense claim the same way that we review any sufficiency of the evidence claim. *See Wilson v. State*, 770 N.E.2d 799, 800-01 (Ind. 2002). "We neither reweigh the evidence nor judge the credibility of witnesses." *Id*. If there is sufficient evidence of probative value to support the conclusion of the trier of fact, we will not disturb the verdict. *See id*. We keep in mind that the State may meet its burden to prove beyond a reasonable doubt the absence of the elements of self-defense not only by rebuttal evidence when the defendant has presented evidence of the defense, but also by affirmatively showing within its case-in-chief that the defendant was not acting in self-defense. *See Harris v. State*, 269 Ind. 672, 674, 382 N.E.2d 913, 915 (1978).

[10] As for the trial court's belief in the State's non-vindictive reason for filing the murder charge, we note that given the duty of candor owed by lawyers toward the tribunal, the judge need not have been immediately distrustful. *See* Ind. Professional Conduct Rule 3.3. That said, given the disagreement over the propriety of the amendment, we are somewhat surprised at the court's failure either to elicit a more detailed explanation from the State or to review the admittedly lengthy tapes. However, in light of the waiver and the fact that Philip's defense did not change, harm has not been demonstrated.

Here, the evidence demonstrated that Philip willingly engaged in mutual combat with his brother. Tr. at 616 ("both of us went like what's up, like to welcome a fight"). It was hardly the first time they had fought. On the evening in question, Philip hit Neal more than once, but then, according to Philip's testimony, tried to stop the fight by telling Neal to "chill out" and by holding him in a headlock. *Id*. at 617-21. Even if the jurors believed: (1) that on the night in question, Philip was fully aware of Neal's past instances of violence, (2) that the multiple other injuries to Neal were not inflicted by Philip, (3) that Philip "withdrew"[11] from combat and communicated his withdrawal,[12] and (4) that Neal had a knife on his person,[13] they would have been justified in concluding that Philip exceeded the amount of force necessary to protect himself, thereby extinguishing his right to self-defense. *See Hollowell*, 707 N.E.2d at 1021.

Under the circumstances, Philip undoubtedly had available to him other alternatives, many of which carried far less serious consequences.[14] Sadly, Philip, in his words, "intentionally pull[ed] the trigger," shooting his twin brother in the face at a distance of approximately one to three feet and killing him. Tr. at 630-31. Reversal is appropriate only if no reasonable person could say that self-defense was negated by the State beyond a

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[11] *See Gillespie*, 832 N.E.2d at 1117.

[12] *See also Wooley v. State*, 716 N.E.2d 919, 926 (Ind. 1999) (noting that a mutual combatant must declare an armistice before he may claim self-defense).

[13] There was conflicting evidence about what sort of knife Neal might have had, whether he always carried a knife in a sheath, where the knife in question may have landed, and whether it might have had a retracting blade.

reasonable doubt. *See Taylor v. State*, 710 N.E.2d 921, 924 (Ind. 1999). Given the standard and the evidence presented, we must affirm Philip's conviction for murder. To reach any other conclusion would be to reweigh evidence and judge credibility, which we are not permitted to do.

Affirmed.

VAIDIK, J., concurs.

BAKER, J., dissents with separate opinion.

IN THE

COURT OF APPEALS OF INDIANA

PHILIP LITTLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0510-CR-509
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BAKER, Judge, dissenting.

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[14] For instance, calling for emergency help, fleeing the home, firing a warning shot, or even shooting Neal's hand that supposedly held the knife, were options that likely would have resulted in less dire

I respectfully dissent from the majority's conclusion that the trial court's exclusion of Lawson's testimony was harmless error. While I agree that the trial court's exclusion was erroneous, it is difficult for me to fathom how this exclusion could have been harmless error when Lawson holds the unique position of being the mother of both the defendant and the victim and Lawson's testimony would have corroborated Philip's testimony regarding Neal's aggressive nature. While the majority rationalizes that the exclusion of Lawson's testimony was harmless error because of the apparent similarity between Lawson's testimony and Philip's testimony, as the majority notes, "Lawson's corroborative testimony could have assisted Philip's claim of self-defense 'considering his credibility was of the utmost importance to his defense.'" Slip op. at 8 (emphasis added) (quoting Brand, 766 N.E.2d at 782).

As the majority notes, to determine whether an erroneous evidentiary ruling affected a party's substantial rights, we must assess the probable impact of the evidence on the trier of fact. Coleman, 694 N.E.2d at 277. It seems to me that Lawson's testimony would have enhanced Philip's credibility more than a typical witness presenting potentially similar evidence because Lawson's testimony was going to corroborate Philip's testimony regarding Neal's aggressive nature despite the fact that Philip killed her son. The probable impact of Lawson's testimony on the trier of fact would have been substantial; therefore, it was not harmless error for the trial court to exclude her testimony. Thus, I would reverse and remand for a new trial.

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repercussions.